



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO 24 OF 2021

JONATHAN MOMANYI.....PLAINTIFF/APPLICANT

VERSUS

JINAT INVESTMENT COMPANY LIMITED.....1ST DEFENDANT/RESPONDENT

VERONICAH RANGI T/A NIRA AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. This ruling is in respect of the Plaintiff's Notice of Motion dated 29th November, 2021 in which the Plaintiff seeks the following orders:

a. Spent

b. Spent

c. Spent

d. Spent

e. That the Honourable Court be pleased to issue an order of mandatory injunction compelling and/or directing the 1st and 2nd Defendants/Respondents to forthwith restore and/or reinstate the Plaintiff/Applicant into the demised premises situate on the building known as Market Plaza which are the land parcel known as KISII MUNICIPALITY/BLOCK 111/77 within Kisii County pending the hearing and determination of this suit.

f. That the Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents either by themselves, their agents, servants and/or any person acting under the Defendant's instructions from entering upon, interfering with, evicting, levying distress, leasing out to any third party and/or otherwise interfering with the Plaintiff/Applicant's possession occupation and use of the demised premises, situate on the building known as Market Plaza which are on the land parcel known as KISII MUNICIPALITY/BLOCK 111/77 within Kisii County pending the hearing and determination of the instant suit.

g. That the Honourable Court be pleased to issue an order of mandatory injunction compelling and/or directing the 1st and 2nd Defendants/Respondents to forthwith restore all the Plaintiff/Applicant's movable goods which were unlawfully seized and/or carted away from the demised premises situate on the building known as Market Plaza which are the land parcel known as KISII MUNICIPALITY/BLOCK 111/77 within Kisii County pending the hearing and determination of this suit.

h. The costs of this application be provided for.

i. Such further or other orders be made as the court may deem fit to grant.

2. The grounds on which the application is based are stated on the face of the Notice of Motion. The Plaintiff swore an affidavit dated 29th November, 2021 in support of the application. In the said affidavit he deposes that he has been a tenant of the 1st Defendant in one of the premises in a building known as Market Plaza which is situated on land parcel number KISII MUNICIPALITY/BLOCK 111/77 within Kisii County where he operates a Guest Room business. He leased the 1st Defendant's business premises at a monthly rent of Kshs. 176,000.

3. It is his contention that he has been paying the said rent as evidenced by the receipts annexed to his affidavit. He further depones that on the 16th November, 2021 the 2nd Defendant broke into the Plaintiff's business premises and seized his goods which he intended to sell by public auction in a bid to levy distress for rent pursuant to a court order issued on 11th November, 2021.

4. He complained that the action of levying distress was illegal as he had not been served with any notice terminating his tenancy, yet he had entered into a controlled tenancy governed by section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301 of the Laws of Kenya.

5. The Plaintiff contended that as a result of the Defendants' actions he had been subjected to enormous losses and he had suffered irreparable damage that cannot be compensated by way of damages. It was therefore his contention that he had established a *prima facie* case with a probability of success and that the balance of convenience tilted in his favour.

6. The application was strenuously resisted by 1st Defendant through the Replying Affidavit of its Director Dr. Anil Tailor, sworn on 9th December 2021. In the said affidavit he deponed that the Plaintiff entered into a lease for a period of 5 years and three months with effect from 1st January, 2016 at an agreed rent of Kshs. 176,000. At the expiry of the said lease agreement, the Plaintiff continued to occupy the demised premises as a month to month tenant at the said monthly rent of Kshs. 176,000/= and by November 2021 he was in arrears of Kshs. 1,800,000. It was therefore his contention that the Plaintiff had filed this suit in the wrong court.

7. He deponed that owing to the outstanding rent arrears, the 1st Defendant opted to levy distress for rent through the 2nd Defendant after following due process. Following the attachment of the Plaintiff's goods an advertisement was placed in the Standard Newspapers, after which the goods were sold on the 29th November, 2021. He therefore contended that the application had been overtaken by events. He denied that the Plaintiff had been evicted from the suit premises. He also stated that the attached receipts for rent did not add up to the rent that was due.

8. In response to the Replying Affidavit, the Plaintiff filed a Further Affidavit sworn on the 10th January, 2022 in which he deponed that since he was a protected tenant, the 1st Defendant ought to have obtained an order to levy distress from the Business Premises Rent Tribunal and not the Chief Magistrate's Court and the Defendants' action was therefore illegal. He further complained that the Defendants did not comply with the procedure for levying distress as no notice was issued by the BPRT before the Plaintiff's goods were seized and sold.

9. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

10. The issues for determination are twofold; the first one is whether the Plaintiff is entitled to the orders of mandatory injunction compelling the Respondents to reinstate him into the demised premises.

The second issue is whether the Plaintiff is entitled to a temporary injunction restraining the Defendants from evicting him or levying distress against him.

11. With regard to the first issue, it is trite law that a mandatory injunction will only be granted under very special circumstances. In the case of **Kenya Breweries Limited v Washington Okeyo (2002) eKLR** the Court of Appeal held that:

“.. A mandatory injunction ought not to be granted in an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant tried to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”

12. The above position was reiterated in the case of **Nation Media Group & 2 Others v Harun Mwau (2014) eKLR** where the Court of Appeal stated that:

“It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate the existence of special circumstances. A different standard higher than that in a prohibitory injunction is required before an interlocutory mandatory injunction is granted.”

13. In the instant suit, although the Applicant contends that the Respondents illegally levied distress for rent against him, there is the looming question of the huge amount of outstanding rent arrears which remains unpaid. The 1st Respondent has also stated on oath that the Plaintiff was never evicted and he is still in occupation of the demised premises. In the circumstances, this is not a proper case for the grant of a mandatory interlocutory injunction.

14. On the second issue, the principles that guide the court in the exercise of its discretion to grant a temporary injunction were set out in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) E.A.358** which are as follows:

“First, the applicant **must show that he has a prima facie case with a probability of success**. Secondly, an interlocutory injunction will not normally be granted unless the applicant **might otherwise suffer irreparable injury** which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a **balance of convenience**.”

15. The first hurdle that the Applicant must surmount is to demonstrate that he has a *prima facie* case with a probability of success.

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

1973 E. A 358 which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

16. It is not in dispute that the Plaintiff/Applicant's goods were sold on 29th November, 2021. It is also not in dispute that the Plaintiff is still in occupation of the demised premises hence the question of injunction to restrain the Respondents from selling the Applicant's good has been overtaken by events. The legality or otherwise of the process of levying distress can only be determined at a full hearing.

17. Having arrived at the finding that the application has been overtaken by events, I find no merit in the application and the same is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF MARCH, 2022

J.M ONYANGO

JUDGE